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ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROSS MAGGIO,

Petitioner

Versus

JOHN FULFORD,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN OVERTURNING A FINDING OF FACT BY THE STATE TRIAL COURT THAT THE RESPONDENT WAS MENTALLY COMPETENT TO STAND TRIAL.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this case below, under case number 80-3932, is set out in the Appendix to this petition, along with the memorandum opinion by the Federal District Court, No. 76-0748. Additionally, the Court of Appeals granted the petitioner's motion for a stay of mandate, which order is also included in the Appendix.

JURISDICTION

The ruling of the United States Court of Appeals, Fifth Circuit, was delivered on November 29, 1982. In that opinion, the Court of Appeals vacated a lower federal

district court's denial of respondent's application for writ of habeas corpus and remanded the case to the lower court for further proceedings consistent with the Court of Appeals' opinion. The petitioner respectfully disagrees with the Court of Appeals' ruling and is now seeking this Honorable Court's review of the case by a writ of certiorari under the authority of 28 U.S.C. §1254 (1). According to 28 U.S.C. §2101 (c), the petitioner has ninety days after the Court of Appeals' decree of November 29, 1982 to file this petition.

STATEMENT OF THE CASE

i) Course Of The Proceedings And Disposition In Court Below

The respondent herein, John Fulford, was arrested and indicted along with three co-defendants for a murder which occurred on April 10, 1971 at the Corso residence on the lakefront area of New Orleans. The trial of the case was moved to Lafayette, Louisiana, in order to assure the defendants fairness and impartiality. After a lengthy trial, the respondent, Fulford, as well as two co-defendants, Kirksey McCord Nix, Jr., and Peter Frank Mule, were convicted of murder. All three were sentenced to life imprisonment. A fourth person, James Knight, was the driver of the getaway car. Knight was originally indicted for the crime, but he was later granted immunity and testified at the trial against the three co-defendants.

After the respondent was convicted he made a direct appeal to the Louisiana Supreme Court in *State v. Nix, et al.*, 327 So.2d 301 (La. 1975). The State Supreme Court affirmed all three of the convictions, including the respondent's conviction, after it carefully considered each of the

140 bills of exception raised by all three defendants.

The respondent next entered the federal court system as a habeas corpus petitioner. The respondent's habeas petition was filed in the United States District Court for the Western District of Louisiana under case number 76-0748. The respondent presented the district court with numerous claims of error, and after considering briefs by both parties, as well as the state court records and transcripts, the district court rejected all of respondent's claims and denied his application for writ of habeas corpus.

The respondent next appealed the district court's decision to the United States Court of Appeals, Fifth Circuit, under case number 80-3932. After briefs and oral agrument were presented to the Fifth Circuit, that court rendered its opinion on November 29, 1982. In its opinion, the Fifth Circuit Court of Appeals rejected all of the claims presented by the respondent, except one. The claim presented by Fulford was that his conviction was obtained unconstitutionally because the state trial court denied a defense motion to appoint a sanity commission to determine whether respondent was competent to assist his counsel and stand trial. The Fifth Circuit Court of Appeals overturned the federal district court's dismissal of that claim and remanded the case to the district court "for a determination of whether an adequate *nunc pro tunc* inquiry can be held regarding Fulford's competency in 1972." *Fulford v. Maggio,* __ F.2d __ (5th Cir. November 29, 1982). Petitioner respectfully objects to the above ruling and now comes to this Honorable Court with a petition for a writ of certiorari to review and reverse the Court of Appeals' ruling.

ii) Statement of Facts

During the late night and early morning of April 10-11, 1971, three armed men forcibly entered the home of Frank Corso, with the apparent intention of committing a burglary. The house was occupied at the time by Mr. Corso, his wife and their three children. Mrs. Corso heard the three men and discovered them during the last stages of forcing the rear door open with a hydraulic jack. She immediately ran down the hall screaming for her husband to help.

Frank Corso was asleep at the time. When he heard his wife's screams, he grabbed a .32 calibre pistol which he kept in the house and confronted the burglars. The three men started firing their weapons and a gunfight ensued. During the gunfight Frank Corso was fatally wounded, and apparently one of the gunmen was also shot. As the men fled from the residence, Mrs. Corso retrieved her husband's weapon and chased the intruders, shooting at them several times. In the sudden escape, the burglars forgot their tools at the door. As the men ran down the street, the wounded one was assisted by one of the other men.

Following a police investigation, John Fulford, the respondent herein, Kirksey McCord Nix, Jr., Peter Frank Mule, and a fourth man named James Knight were all arrested for the murder of Mr. Corso. All were indicted for murder by the Orleans Parish Grand Jury. Knight, the driver of the getaway car, was severed from the others and granted immunity in return for his testimony. Following a change of venue to Lafayette Parish, the other three were jointly tried and found guilty without capital punishment. Thereafter, the three were sentenced to life imprisonment.

There are certain other facts that are relevant to this petition that occurred during the progress of the case through court. On March 1, 1972, the morning respondent's trial was to begin, counsel for respondent filed a motion to appoint a sanity commission for the purpose of deciding whether the respondent was competent to assist his counsel in his defense. A hearing was held that morning where respondent presented one witness, a psychiatrist, who had briefly examined the respondent the day before. After the testimony of the respondent's witness and arguments by both sides, the state trial court made a finding of fact that the respondent was competent to stand trial and therefore it denied the motion. (State Record Vol. 4, pp. 931-953). It is this motion, the subsequent hearing and court ruling that form the core of the issue in question.*

SUMMARY OF ARGUMENT

I

THE FIFTH CIRCUIT COURT OF APPEALS ERRED WHEN IT REVERSED THE DISTRICT COURT'S DECISION BECAUSE THE DISTRICT COURT'S DECISION WAS BASED ON A SPECIFIC FINDING OF FACT MADE BY THE STATE TRIAL COURT. THAT FINDING OF FACT HAS A PRESUMPTION OF CORRECTNESS WHEN VIEWED BY A FEDERAL COURT ON A HABEAS APPLICATION. THE

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* The motion to appoint a sanity commission, as well as all the relevant transcripts and findings of fact by the state trial court can be found in the state court record. The complete record is twenty-four volumes in length and it is presently in the custody of the Clerk of Court for the United States Court of Appeals, Fifth Circuit, under case number 80-3932.

DISTRICT COURT FOLLOWED THAT PRESUMPTION BUT THE COURT OF APPEALS DID NOT. THE FIFTH CIRCUIT COURT OF APPEALS' FAILURE TO FOLLOW THE PRESUMPTION OF CORRECTNESS OF THE STATE COURT'S FINDING OF FACT WAS NOT BASED ON ANY OF THE SPECIFIC EXCEPTIONS SET OUT IN 28 U.S.C. §2254 (d). THEREFORE THE COURT OF APPEALS' REVERSAL WAS IMPROPER.

II

ALSO, THE PETITIONER SUBMITS THAT CONSIDERING THE EVIDENCE THAT WAS PRESENTED TO THE STATE TRIAL COURT AT THE TIME THE RESPONDENT ASSERTED HIS NEED FOR A COMPETENCY HEARING, THE RESPONDENT FAILED TO DEMONSTRATE THAT THERE WAS A REAL, SUBSTANTIAL AND LEGITIMATE DOUBT AS TO THE MENTAL CAPACITY OF RESPONDENT TO MEANINGFULLY PARTICIPATE AND COOPERATE WITH HIS COUNSEL. THE PETITIONER SUBMITS THAT THE COURT OF APPEALS INCORRECTLY APPLIED THAT STANDARD TO THE FACTS AND EVIDENCE IN THE STATE TRIAL COURT'S POSSESSION AND THEREFORE ITS DECISION TO REMAND THE CASE TO THE DISTRICT COURT SHOULD BE REVERSED.

ARGUMENT

I

On the day before the trial was to begin, counsel for respondent filed a motion for the appointment of a sanity

commission to examine the respondent and determine whether he was competent to assist counsel in his defense. The standard by which the state trial court was to decide on Fulford's competency was set out in the following statute and cases:

> "The trial court may, in the exercise of its sound discretion, order a mental examination of the defendant when it has reasonable grounds to doubt the defendant's mental capacity to proceed. La.Code Crim. Pro. art. 643.

According to the Louisiana Supreme Court, the decision of the trial court on this issue would not be reversed unless there is a strong showing of a clear abuse of the trial court's discretion. *State v. Luquette,* 275 So.2d 396 (1973). The appointment of a lunacy commission is not a prefunctory matter or a ministerial duty of the trial court, nor is it guaranteed to every accused in every case. *State v. Graves,* 174 So.2d 118 (1965). Against this statutory and jurisprudential background the trial court was presented the following evidence on the issue of Fulford's competency:

Respondent presented Dr. William McCray, a psychiatrist, who had examilned Fulford in his cell the previous day for about fifty minutes. Doctor McCray found Fulford to be well oriented as to time, place and person and he seemed cognizant of physical facts of what was going on around him. Nevertheless Doctor McCray concluded that Fulford had paranoid delusions which kept him from adequately assisting in his own defense. The only source of Doctor McCray's information was from respondent's own statements. The doctor related the following account of his interview with Fulford at the hearing: (State Record, Vol. 4, pp. 942-943)

> He spoke with me at great length about his—his —well, concerns or his beliefs that everyone connected with him in the case was against him and attempting to keep him from—from going to trial and attempting to prevent him from proving his innocence.
>
> Because of this, he stated that he was withholding names of witnesses, that he felt could prove his innocence because if he revealed these names that they would be arrested and held in jail and kept from testifying for him. He felt that not only his attorneys but that the judge was against him and in league to keep him from his day in court, that the illness—the recent illness of the judge was not an illness at all but just another ploy to—too keep him out of court. As a result of—of this meeting with him, it was my preliminary opinion that the—that Mr. Fulford had paranoid delusions which kept him from adequately assisting in his own defense.

After the above testimony, both sides submitted oral argument and the trial judge denied the motion. In two *per curiam* opinions the trial court set out its findings of fact on the issue of whether to appoint a sanity commission to examine Fulford further: (Per Curiam no. 29, State Record, Vol. 4, pp. 952-953)

> "I was satisfied that this defendant was oriented as to time, date and place and was cognizant of everything around him. It *appeared to me that this was just a subterfuge on the part of this defendant to attempt to keep from going to trial so that he would be tried at a different time from the other defendants.* Subsequent happenings during the trial and after the trial have thoroughly convinced me that my ruling at the time of his hearing was correct.

> "...I might add that upon resentencing of this defendant in Lafayette, Louisiana during the first part of January, 1974, when he requested that I relieve his court appointed attorney and allow him to represent himself, I raise(d) the question of his mental capacity and pointed out to him this motion of which I am now speaking. He stated to me emphatically that he was of sound mind and that he did not need a lawyer and that he would have me reversed." (Emphasis added).

Also, it is important to note that just two days after counsel contended that Fulford was not competent to assist him, Fulford made the following motion, on his own, to the court: (State Record, Vol 5, pp. 526-527)

> THIS COURT:
>
> All right, Mr. Fulford, you wish to state something now sir?
>
> MR. FULFORD:
>
> Yes, sir, I do. Am I going to be allowed to assist in my defense, or may I defend myself?
>
> THIS COURT:
>
> You will be allowed to assist your counsel in your defense, yes, sir.
>
> MR. FULFORD:
>
> Could it be that the counsel could assist me?
>
> THIS COURT:
>
> They are the—

MR. FULFORD:

I would elect to defend myself.

THIS COURT:

I have denied that request, sir.

MR. FULFORD:

Could I deny—could I defend myself with the assistance of counsel?

THIS COURT:

They will do the assisting and you can assist your counsel in your defense.

MR. FULFORD:

That is not what the Constitution says, Your Honor.

THIS COURT:

Well, —

MR. FULFORD:

It says that I'm entitled to the assistance of counsel. *I can defend myself,* and that is the point I'd like to get across.

THIS COURT:

Well, I'm going to allow—

MR. FULFORD:

May I do that?

THIS COURT:

—you to assist your counsel in your defense, Mr. Fulford. And the Court's ruled.

MR. FULFORD:

I'm—I'm going to take a bill to that—to that ruling, too, Your Honor. (Emphasis added).

Finally, in a related *per curiam*, the trial court made the following findings of fact: (Per Curiam, no. 42, State Record, Vol. 5, pp. 1024, 1025)

"I might further add, contrary to what the doctor testified at the hearing to determine whether Mr. Fulford was unable to assist counsel in his defense, that the alleged eyewitnesses, which Mr. Fulford stated would prove his innocence, were called and did testify as to his alleged alibi. Throughout the entire trial Mr. Fulford was accorded a complete and full defense and I saw nothing from the beginning of the trial to the end that in any way detracted from any of Mr. Fulford's rights. I hesitate to state but I do feel that this was a plan designed by Mr. Fulford to try to disrupt his trial and to prevent him from being tried with his co-defendants.

"Subsequent to this point in the trial and the numerous motions filed by Mr. Fulford, individually, and including his statements in open court when he was sentenced in Lafayette, Louisiana, in January, 1974, that he was well able to defend himself and that he was going to get me reversed, I am now thoroughly convinced that the lunacy hearing and the motion to sever were purely attempts to try to delay the trial or prevent Mr. Fulford from being tried at that time."

To corroborate the trial court's finding of fact that, in contradiction of what the respondent told the doctor about his fear of calling witnesses, Fulford called two alibi witnesses who testified in his behalf that he was in Gulfport, Mississippi at the time of the murder. (State Record, Vol. 22, pp. 2393-2405). Contrary to what Fulford claims in his brief and to what the Fifth Circuit Court of Appeals stated in its opinion, there is nothing in the record to indicate that these two alibi witnesses were contacted by anyone other than Fulford himself. The trial court was able to observe the respondent during all of the pretrial motions, and during those personal observations, the court was much better the judge of whether Fulford was cognizant of what was going on in court, than the federal court of appeals who looked at an inanimate record years later.

After reading the same record as the federal court of appeals would read, the Louisiana Supreme Court dismissed this claim by making its own finding that the respondent was competent to stand trial and the trial court was correct in its denial of the motion. At page 324, the Louisiana Supreme Court stated: (*State v. Nix, et al,* 327 So.2d 301 (1975)).

> "The judge's findings are amply supported by the record. Mr. Fulford told Doctor McCray on February 29, 1972, that he could not trust his attorneys and would not divulge the names of his alibi witnesses. On Thursday, March 9, 1972, the alleged alibi witnesses were in court testifying on Mr. Fulford's behalf. Thus it is clear that Mr. Fulford did not withhold the names of his witnesses, and was able to assist his counsel in the preparation and conduct of his defense...
>
> "...In view of the ability of the trial court to

observe Mr. Fulford at length during the preliminary hearings and the trial of this case, coupled with the limited time Doctor McCray spent in formulating his opinion as to Mr. Fulford's mental condition, we cannot say the trial court abused its considerable discretion in refusing to appoint a lunacy commission to evaluate John Fulford."

The decision of whether any defendant is competent to stand trial and assist counsel is always ultimately with the trial court. Regardless what an examining physician may conclude, it is the trial court's responsibility to make a judgment about the defendant's ability to stand trial. The making of that decision may be assisted by the opinions of doctors who examine the defendant, and of course the trial court should rely on its observations of the defendant which, in a case of this magnitude, were numerous.

In making the decision in this case, the trial court compared all of its observations of the respondent with the testimony of the doctor, which was mostly just a recitation of the self-serving statements made to the doctor by Fulford. As displayed earlier in this petition, the record in this case contains ample evidence which was used by the trial court in making its findings of fact and the trial court's finding is fairly supported by the record.

28 U.S.C. §2254 (d) states:

"(d) in any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were

> parties, evidenced by a written finding, shall be presumed to be correct..."

This Honorable Court in *Sumner v. Mata*, __ U.S. __, 102 S.Ct. 1303 (1982), stated when construing this statute, "we deal here a statute that requires the federal courts to show a high measure of deference to the fact findings made by the state courts." (at page 1207).

In examining the reasons for the trial court's decision to deny the respondent's motion for a sanity commission, the petitioner submits that the record more than fairly supports that decision. When the Fifth Circuit Court of Appeals made its contrary decision, it not only disregarded the trial court's finding of fact, as well as the Louisiana Supreme Court's separate consistent finding of fact, but it did not give the evidence presented here, which was the basis of the trial court's decision, the deference that this Honorable Court has required a federal court to give when it is reviewing a state conviction on a habeas application. Because the federal court of appeals did not give the state trial court's decision and the supporting evidence which is present in the record, the deference it should be given, and because the record fairly supports the trial court's ruling, petitioner submits that the Fifth Circuit Court of Appeals' ruling to remand the case was incorrect. Therefore, the petitioner urges this Honorable Court to vacate that ruling and reinstate the federal district court's denial of respondents habeas application.

II

The second argument by petitioner concerns the issue of respondent's mental competency itself during the time in question. The test that applies to this question was

set forth in *Pedrereo v. Wainwright*, 590 F.2d 1383 (5th Cir. 1979), where that court stated that, a habeas petitioner who contends

> "that he was entitled to a competency hearing must show that there were matters known to the trial court that raised at that time a 'real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully particiapte and cooperate with counsel.' " (At page 1388, citing *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973).

The petitioner submits that when the evidence presented to the trial court by the respondent is compared with the trial court's own observations of respondent, together with all the other attempts of respondent to avoid trial, it shows that there was not a "real, substantial and legitimate doubt" as to respondent's competency. The trial court was not bound to agree with the examining doctor's conclusions about respondent's condition. These conclusions were, as the doctor candidly admitted, really nothing more than his repeating the self-serving statement made by respondent at their short meeting. The court was fairly comparing its own observations of respondent during the course of the pretrial proceedings, with the scenario that respondent related to the doctor, which was reasonably calculated by respondent to make the doctor think that respondent was incompetent to proceed with the case. Based on this comparison, the trial court concluded that respondent was merely attempting to delay his trial and void being tried jointly with his con-defendants.

The decision by the trial court was a considered one which was based entirely upon the court's actual observations of the witness, the respondent and the respondent's

attempts to sabotage the prosecution. The trial court correctly concluded that there was no real, substantial or legitimate doubt about Fulford's competency at the time he stood trial. The trial court's conclusion was, in effect, a ruling on the respondent's competency after a hearing on the issue. The totality of the evidence supports the trial court's conclusion that there was no "real, substantial or legitimate doubt" concerning the respondent's capacity to assist his counsel. The Fifth Circuit Court of Appeals' ruling on this issue was incorrect, and the petitioner urges this Court to reverse that court's ruling and affirm the district court's denial of respondent's writ of habeas corpus.

CONCLUSION

Based on the foregoing arguments and jurisprudence, petitioner respectfully asks this Honorable Court to reverse the decision of the Fifth Circuit Court of Appeals in this case, and reinstate the district court's denial of respondent's writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Petition For Writ of Certiorari have been served upon respondents by placing a copy of same in the United States Mail, postage prepaid, addressed to:

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